

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	
)	
THE WOODLANDS OF KNOXVILLE II,)	
LLC, DOVETAIL BUILDERS, INC.,)	
And)	DIVISION OF WATER
BLOUNT EXCAVATING, INC.)	POLLUTION CONTROL
)	
RESPONDENTS)	CASE NUMBER WPC07-0181
)	

COMMISSIONER’S ORDER AND ASSESSMENT

NOW COMES James H. Fyke, Commissioner of the Tennessee Department of Environment and Conservation, and states:

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the “Commissioner” and the “Department” respectively).

II.

The Woodlands of Knoxville II, LLC, (hereinafter “Respondent Woodlands”) is an active limited liability company licensed to conduct business in the state of Tennessee and is the owner of Woodlands of Knoxville – Phase II (hereinafter “the site”), a residential subdivision located on Cherokee Trail in Knox County, Tennessee. Service of process may be made on Respondent Woodlands through Arthur G. Seymour, Registered Agent, at 550 West Main Avenue, Suite 500, Knoxville, Tennessee 37902.

III.

Dovetail Builders, Inc., (hereinafter “Respondent Dovetail”) is a foreign corporation licensed to conduct business in the state of Tennessee, and is the signatory authority for construction activities at the site. Service of process may be made on Respondent Dovetail through Arthur G. Seymour, Registered Agent, at 550 West Main Street, Suite 500, Knoxville, Tennessee 37901.

IV.

Dave Mulkey, (hereinafter “Respondent Mulkey”) is CEO of Dovetail Builders and is the signatory authority for construction activities at the site. Service of process may be made on Respondent Mulkey through Arthur G. Seymour, at 550 West Main Street, Suite 500, Knoxville, Tennessee 37901.

V.

Blount Excavating Inc., (hereinafter “Respondent Blount”) is an active corporation licensed to conduct business in the state of Tennessee and is an operator at the site. Service of process may be made on Respondent Blount through Steve B. Garner, Registered Agent, at 3700 Garner Circle, Maryville, Tennessee 37803.

JURISDICTION

VI.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the “Act”), has occurred, or is about to occur, the Commissioner may issue a complaint to the violator and the Commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the Commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the

state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the Commissioner may delegate to the director any of the powers, duties, and responsibilities of the Commissioner under the Act.

VII.

The Respondents are “persons” as defined by T.C.A. § 69-3-103(20) and as herein described, have violated the Act.

VIII.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (hereinafter the “TNCGP”) may be obtained by submittal of a Notice of Intent (NOI).

IX.

The unnamed tributary to the Tennessee River, described herein, is “waters of the state”, as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife.

FACTS

X.

On October 3, 2006, the Division of Water Pollution Control (hereinafter “Division”) received a NOI in which TNCGP coverage for the site was requested. Respondent Dovetail was listed as the owner/developer of the site and Respondent Mulkey was listed as the CEO and signatory authority of Respondent Dovetail. A primary contractor at the site was not identified on the NOI. Coverage was issued on October 24, 2006.

XI.

On November 3, 2006, Respondent Blount signed a NOI as an operator at the site.

XII.

On April 25, 2007, Division personnel from the Knoxville Environmental Field Office (K-EFO), along with personnel from the City of Knoxville Engineering Division conducted an inspection of the site. Division personnel noted that Erosion Prevention and Sediment Control measures (EPSC) across the site were inadequate, un-maintained, and not in accordance with the site’s Storm Water Pollution Prevention Plan (SWPPP). Extensive sediment deposits up to 24 inches in depth were noted for several hundred linear feet downstream of the site. Division personnel met with representatives of Respondent Dovetail and pointed out these violations.

XIII.

On May 1, 2007, the Division issued a Notice of Violation (NOV) to Respondent Dovetail for the violations noted during the April 25, 2007, site inspection. The NOV instructed Respondent Dovetail to implement Best Management Practices (BMP) to control and treat sediment on site, stabilize all slopes that were at final grade and stabilize all construction areas

that were to be idle for more than 14 days. The NOV further instructed Respondent Dovetail to respond in writing within 14 days of receipt regarding the measures taken to comply with the NOV and TNCGP. Additionally, the NOV instructed the Respondents to attend a Compliance Review Meeting (CRM) at the K-EFO on May 17, 2007. Respondent Dovetail acknowledged receipt of the NOV on May 7, 2007.

XIV.

On May 16, 2007, the Division received a copy of correspondence from the City of Knoxville Engineering Division assessing monetary penalties against Respondent Dovetail for repeated violations of local stormwater ordinances.

XV.

The CRM scheduled for May 17, 2007, was cancelled due to non-attendance by Respondent Dovetail.

XVI.

On May 23, 2007, Division personnel met with representatives of Respondent Dovetail at the site and noted little improvement in the EPSC measures. Specifically, the slopes at final grade and the idle construction areas had not been stabilized and the silt fencing had not been maintained. Division personnel noted continuing sediment loss from the site into the unnamed tributary to the Tennessee River. Upon further investigation, Division personnel noted extensive sediment deposits up to 36 inches in depth for approximately 1,400 linear feet downstream from the site.

XVII.

On May 31, 2007, a compliance review meeting was held at the K-EFO. Representatives of Respondent Dovetail and the City of Knoxville Engineering Division were in attendance as well as representatives of Blount Excavating. During this meeting Division personnel instructed the Respondents to submit the required EPSC inspection reports, begin developing a plan for stream remediation, and implement appropriate EPSC measures at the site.

XVIII.

On June 25, 2007, Division personnel conducted an inspection of the site and again noted little improvement in the site EPSC measures. Specifically, slopes at final grade were not stable and silt fencing throughout the site was in need of maintenance. Sediment was continuing to be deposited in the unnamed tributary to the Tennessee River.

XIX.

On August 10, 2007, Division personnel conducted an inspection of the site and noted that large areas of the site had been built-out, landscaped and stabilized. However, the EPSC measures in the remaining active areas were inadequate and in need of maintenance. To date, the Division has received neither the written response requested in the May 1, 2007, NOV, nor the EPSC inspection reports requested during the May 31, 2007, CRM.

XX.

During the course of investigating the activities of the Respondents, the Division has incurred DAMAGES in the amount of NINE HUNDRED THIRTY EIGHT DOLLARS AND FIFTY ONE CENTS (\$938.51).

VIOLATIONS

XXI.

By failing to comply with the terms and conditions of the TNCGP as described herein, the Respondents have violated T.C.A. Sections §§ 69-3-108(b) and 69-3-114(b):

T.C.A. § 69-3-108(b) states, in part:

- (b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:
 - (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
 - (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
 - (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

T.C.A. §§ 69-3-114(b) states:

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part

XXII.

By causing a condition of pollution to the unnamed tributary to the Tennessee River, the Respondents have violated T. C. A. § Section 69-3-114(a).

T.C.A. § 69-3-114(a) states:

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XXIII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, James H. Fyke, hereby issue the following ORDER AND ASSESSMENT to the Respondents.

1. The Respondents shall, within 7 days of receipt of this ORDER, establish effective EPSC measures on-site such that sediment is not allowed to leave the site or enter waters of the state. These EPSC measures shall be maintained until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established.
2. The Respondents shall, within 7 days of establishing effective EPSC measures, submit written documentation and photographic evidence indicating that these measures are in place. The Respondents shall submit this written documentation and photographic

evidence to the Water Pollution Control Manager in the K-EFO at 3711 Middlebrook Drive, Knoxville, Tennessee 37921, and a copy of the written documentation and photographic evidence to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.

3. The Respondents shall, within 60 days of receipt of this ORDER, submit to the Division a corrective action plan (CAP) to remove the accumulated sediment from the unnamed tributary to the Tennessee River. The CAP shall be prepared by a licensed professional engineer, landscape architect, or other competent professional and shall detail the manual methods to be used to remove the accumulated sediment from the affected areas downstream of the site. The Respondents shall submit the CAP to the K-EFO for review and approval and shall submit a copy of the CAP to the E&C Section, at the respective addresses shown in item 1, above. The Respondents must correct any deficiencies the Division finds upon review of the CAP and the corrected CAP should be resubmitted to the Division within 30 days of notification of the deficiencies.
4. The Respondents shall, within 30 days of receipt of written approval of the CAP, initiate the approved actions. The written approval of the CAP by the Division will constitute authorization for sediment removal from the affected areas downstream of the site and no additional ARAP coverage is required. The Respondents shall submit written notification to the Division that work has begun at the time the Respondents initiates the CAP. The Respondents shall submit the written notification to the K-EFO and shall submit a copy of the written notification to the E&C Section, at the respective addresses shown in item 1, above.

5. The Respondents shall, within 180 days of initiating the approved CAP, but not later than August 31, 2008, complete the CAP and submit written notification of completion to the Division. The Respondents shall submit the written notification to the K-EFO and shall submit a copy of the written notification to the E&C Section, at the respective addresses shown in item 1, above
6. The Respondents shall, within six months of receipt of this Order and Assessment, provide documentation that all employees who manage or oversee construction projects have successfully completed the department's Erosion Prevention and Sediment Control Workshop. Documentation of completion should be submitted to the K-EFO and a copy to the E&C Section at the respective addresses shown in item 1, above. Information may be found on the program website at <http://www.tnepsc.org/>.
7. The Respondents shall pay DAMAGES to the Division in amount of NINE HUNDRED THIRTY EIGHT DOLLARS AND FIFTY ONE CENTS (\$938.51).
8. The Respondents shall pay a CIVIL PENALTY of THREE HUNDRED SEVENTY EIGHT THOUSAND FIVE HUNDRED DOLLARS (\$378,500.00) to the Division, hereby ASSESSED to be paid as follows:
 - a. The Respondents shall, within 30 days of entry of this ORDER, pay a CIVIL PENALTY in the amount of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00).

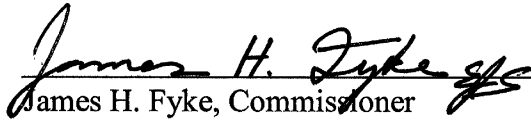
- b. If the Respondents fail to comply with Part XXIII, item 1 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of SIXTY THOUSAND DOLLARS (\$60,000.00), payable within 30 days of default.
- c. If the Respondents fail to comply with Part XXIII, item 2 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00), payable within 30 days of default.
- d. If the Respondents fail to comply with Part XXIII, item 3 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00), payable within 30 days of default.
- e. If the Respondents fail to comply with Part XXIII, item 4 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00), payable within 30 days of default.
- f. If the Respondents fail to comply with Part XXIII, item 5 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of SIXTY THOUSAND DOLLARS (\$60,000.00), payable within 30 days of default.
- g. If the Respondents fail to comply with Part XXIII, item 6 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of EIGHT THOUSAND FIVE HUNDRED DOLLARS (\$8,500.00), payable within 30 days of default.

The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The Director of the Division may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for this time extension, the Respondents shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the Division will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondents are advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation on this 14th day of November, 2007.


James H. Fyke, Commissioner
Tennessee Department of Environment and
Conservation

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

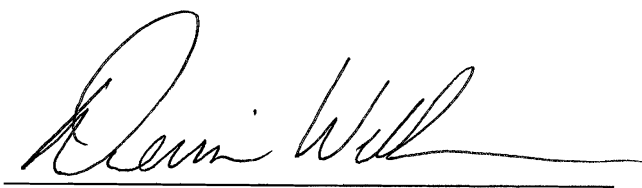
Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization. It is the Department's position that corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal

proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the state of Tennessee.

Furthermore, in the event the Board finds that the Respondent is responsible for the alleged violations after a hearing, the Board has the authority to assess additional damages incurred by the Department, including, but not limited to, all docketing expenses associated with the setting of the matter for a hearing and the hourly fees incurred due to the presence of an administrative law judge and a court reporter. Any petition to appeal which is filed should be sent to Devin Wells, Assistant General Counsel, Office of General Counsel at the address listed below. The case number, **WPC07-0181**, should be written on all correspondence regarding this matter.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to Devin Wells, Assistant General Counsel, at the address listed below. The case number, shown above, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.

A handwritten signature in black ink, appearing to read "Devin Wells", is written over a horizontal line.

Devin Wells
Assistant General Counsel
Tennessee Department of Environment & Conservation
401 Church Street, L & C Tower 20th Floor
Nashville, Tennessee 37243-1548